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Child relocation: What kind of phenomenon is it? What are its protection tools?

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Abstract: This work has as its topic of investigation a path of international private law regarding the issue of child relocation. Are there ad hoc rules for child relocation? What is the difference between common law and European countries in this issue? Does the transnational nature of contemporary families have more protection or do they find remedies through national rules in this regard? What did the European legislator do in the matter in question? These are some of the questions that we see in the next paragraphs and above all we examine the role of the minor in this context and the type of protection he has.

Keywords: child relocation; international families; Hague Conventions; Council of Europe; Brussels IIb Regulation.

Introduction

When a minor loses his/her residence, i.e. when one of the parents changes it and the other does not accept it, we speak of abduction, a very difficult phenomenon for the life of a minor.

The Council of Europe through the Recommendation CM/Rec(2015)[1] for the resolution of disputes and its own solution in cases of child relocation[2] allows us to define the change of residence before or not of the abduction of a minor as a voluntary change of his/her habitual residence[3].

The problem becomes more difficult when the relative transfer of the minor is abroad. At this point we can speak for a stronger conflict of a transnational nature and with the need to resolve this situation based on private international law norms. This is a very frequent phenomenon in recent years, given that families are now more international and in the case of families that are not part of the European geographical circle we can speak of a real controversy[4], i.e. made up of spouses or partners of different nationalities, involving situations in which the need of one of the two parents to place the center of their life and their joint child in a state other than that of origin, or again, to return to the state of origin after a period of residence in an other state, is not

1Beilfuss, C.J. (2022). Evaluating of Recommendation CM/REC (2015) on preventing and resolving disputes on child relocation. Council of Europe, European Committee on Legal Co-operation, 5-15: https://rm.coe.int/cdcj-2021-27e/1680a72905

2Beilfuss, C.J. (2022). Evaluating of Recommendation CM/REC (2015) on preventing and resolving disputes on child relocation. Council of Europe, European Committee on Legal Co-operation, 5-15.

3Beilfuss, C.J. (2022). Evaluating of Recommendation CM/REC (2015) on preventing and resolving disputes on child relocation. Council of Europe, European Committee on Legal Co-operation, op. cit.

4Klugman, C. (2017). Briefing European added value in action. A Europe for mobile and international families, EPRS (European Parliamentary Research Service), 1-4.

shared by the other spouse or custodial partner and therefore disputes arise.

We can speak of relocation when we have the formation of two spouses or partners of different nationalities where one of the two together with their minor child reside in a state other than that of origin. Relocation disputes arise when the situation is the same as the one just mentioned before adding the case of the return of one of the parents to the state of origin after a period of residence in another state without being a priority for the other spouse or for the custodial partner and in this situation the first quarrels begin. Within this context we speak of an evolution of the concept of family through changes and trends concerning the fluidity of emotional ties for the minor, and for the parental figures that become bearers of new rights and interests of "absolute" support. As regards the relocation dispute (Schuz, 2021; Emon, Khaliq, 2021) of couples who are not married, the female is the protagonist instead the father plays a secondary and auxiliary role. In this case, the greatest disputes are noted when one of the parents are moving from one country to another (Olàh, Richter, Kotowska, 2014; Oláh, Kotowska, Richter, 2018).

Changing the habitual residence of the minor is a decision that actually concerns three subjects: a) the custodial parent who habitually resides in the minor and has the choices of his own

personal and professional life and therefore also the minor is involved; b) minors with specific rights and interests who have personal relationships with both parents as guaranteed by art. 9 of the New York Convention (Stahl, 2007; Tobin, 2019)[5]; c) the parent who is called: "left behind", i.e. the parent at risk where, in the case of moving abroad or after an interruption for any reason, he/she essentially "loses" control and contact with the minor.

For a child relocation an agreement is needed, especially when it cannot be reached between the parties involved, especially with who carries out an illicit transfer, reaching the point of child abduction (Scott, Emery, 2014; Baker, Groff, 2016; Pretelli, 2021). It is a behavior with negative consequences for the life of the minor as well as the beginning of a fairly complex judicial dispute.

Of course, the main objective is the lawful relocation and the reaching of agreements on the transfer of the habitual residence of the minor. In this case it is also difficult to understand the mediating role it may have. The question is what are the elements to resolve the relative dispute by always placing the protection of the life of the minor at the top of the pyramid. Within this context we recall what the Conventions of the Hague of 1980 and of 1996, the Declaration of Washington and, the

5See Artt. 8-9 and 12 of the New York Convention on the rights of the child of 20 November 1989.

Recommendation of the Council of Europe establish in relation to the provisions of the Regulation Brussels II ter established by the EU legislation.

What is the jurisprudence in common law?

The lawful relocation is a phenomenon that dates back to the early 1990s where changes in society, especially the American one (Bulow, Gellman, 1983; Bruch, 2006; Dwyer, 2006; Herring, Taylor, 2006; Fehlberg, Smyth, Maclean, 2011; Berenos, 2012; Hasson, 2013; Fehlberg, Smyth, Maclean, Roberts, 2017; McCarty, Hayman, 2018) affected legislation as divorces and parental relocations were more than usual (Austin, 2016). It was national law that started to develop greater protection for parents seeking to relocate by giving greater protection to the child who needed to be protected. Transfers within the federal state outline the subjects involved by finding the possible solutions that arise in cases of child relocation. The growth of this phenomenon[6], as well as the differences in the

6See the leading case: D'Onofrio v. D'Onofrio, 144 N.J. Super. 200 (1976) Superior Court of New Jersey, Chancery Division. [2011] EWCA Civ 793, [2012] 2 FLR 880. 12 [2012] EWCA Civ 1364, [2013] 1 FLR 645. Re F (International Relocation Cases) [2015] EWCA Civ 882' [2015] Family Law, October . For a summary of the law at the time of this research, see R George, F Judd QC, D Garrido and A Worwood, Relocation: A Practical Guide, 1st Edn (Jordans, 2013), Ch 2. Re H (Leave to Remove) [2010] EWCA Civ 915, [2010] 2 FLR 1875; J v S (Leave to Remove) [2010] EWHC 2098 (Fam), [2011] 1 FLR 1694; Re W (Relocation: Removal Outside Jurisdiction) [2011] EWCA Civ 345, [2011] 2 FLR 409.

jurisprudence of the courts have led the related US institutions to create some acts of soft law, of a non-binding nature to provide common solutions to all state systems (Atkinson, 2010; Larson, 2013; George, 2015; Stanley, 2016)[7]. The Model Act on

7See ex multis: Watt v. Watt, 971 P.2d 608, 616-17 (Wyo. 1999). Light v. D'Amato, 2014 ME 134, 105 A.3d 447.Edwards v. California, 314 U.S. 160, 178 (1941) ("The right to move freely from state to state is an incident of national citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference[.]"); see also Kent v. Dulles, 357 U.S. 116, 125 (1958) ("The right to travel is part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment."); Shapiro v. Thompson, 394 U.S. 618, 642 (1969) ("The constitutional right to travel from one state to another has been firmly established and repeatedly recognized (…) This constitutional right (...) of course, includes the right of entering and abiding in any state in the Union[.]"). Jones v. Helms, 452 U.S. 412, 418-419 (upholding a fundamental right torelocate amongst the states but recognizing that there are "situations in which a state may prevent a citizen from leaving.") (1981). LaChapelle v. Mitten, 607 N.W.2d 151, 163 (Minn. Ct. App. 2000) (holding that the best interest of the child is a compelling interest sufficient to satisfy strict scrutiny); In re Custody of D.M.G. and T.J.G., 951 P.2d 1377 (Mont. 1998) (holding that constitutional right to interstate travel is "qualified" by the best interests of the child). Clark v. Atkins, 489 N.E.2d 90, 99-100 (Ind.Ct.App. 1986) (recognizing protecting the interests of children as a "compelling objective" but also holding that an order requiring the mother to return to Indiana from Oklahoma upon finishing schooling "does not impose any necessary burden whatever upon her right to travel (…)"). Lachapelle v. Mitten, 607 N.W.2d 151, 163 (Minn. Ct. App. 2000). The Court of Appeals of Minnesota recognized that a young girl's mother had a fundamental right to relocate, but its holding was still beautifully simple: "The deprivation of fundamental rights is subject to strict scrutiny and may only be upheld if justified by a compelling state interest. The compelling state interest in this case is the protection of the best interests of the child (…)".

Wyo. Stat. Ann. § 20-2-204(b) (2012) (noting that the parent petitioning the court for modification of the current child custody order must prove there has been a substantial change in circumstances before the court can conduct a best interests analysis); Love v. Love, 851 P.2d 1283 (Wyo. 1993). In re Marriage of Ciesluk, 113 P.3d 135, 143 (Colo. 2005) (rejecting Wyoming's approach in Watt): "(…) one court has gone to the other extreme and has found that a parent's constitutional right to travel may actually serve to trump the best interests of a child in a relocation case"). Love v. Love, 851 P.2d 1283, 1287 (Wyo. 1993) ("Cases involving relocation of parents are fact sensitive; we would be remiss to attempt to define a bright line test for their determination."); see Tropea v. Tropea, 87 N.Y.2d 727, 740 (1996) ("[I]t serves

Relocation (Glennon, 2008) of 1997[8] included 22 sections leading to the resolution of disputes that had to do with the relocation of the child, as well as the obligation of habitual residence of the child to another parent. The Principles of the Law of Family Dissolution of the American Law Institute in

neither the interests of the children nor the ends of justice to view relocation cases through prisms of presumptions and threshold tests (…)"). Watt v. Watt, 971 P.2d 608, 613 (Wyo. 1999) ("(…) in seeking a modification of the custody provision of the divorce decree, Mr. Watt assumed the burden of establishing that a material and substantial change in circumstances had occurred, following the entry of the initial divorce decree, which outweighed societal interests in supporting the doctrine of res judicata (...)"). In re Marriage of Ciesluk, 113 P.3d at 142 ("(…) relocation disputes present courts with a unique challenge: to promote the best interests of the child while affording protection equally between a majority time parent's right to travel and minority time parent's right to parent (…)"). Amoco Production Co. v. Bd. of Cnty. Comm'rs of Cnty. of Sweetwater, 55 P.3d 1246, 1249-1250 (Wyo. 2002) (citing Eklund v. PRI Envtl. Inc., 25 P.3d 511 (Wyo. 2001)) (stating that the following four factors: "(...) determine whether res judicata applies: (1) identity of parties is the same; (2) identity of subject matter is the same; (3) issues are the same and relate to the subject matter; and (4) the capacities of the persons are identical in reference to subject matter and issues between them (...)"). DJG v. MAP, 883 P.2d 946, 947-948 (Wyo. 1994). Wyo. Stat. Ann. § 20-2-204 (2012) (providing that Wyoming's statute governing the modification of the previous child custody order permits a "best interests" analysis in a few situations, including, but not limited to, a substantial change in circumstances); Watt, 971 P.2d at 613 (citing DJG, 883 P.2d at 947) Troxel v. Granville, 530 U.S. 57, 80 (2000): agreeing: "(…) with the plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case (…)".530 U.S. at 66 (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972)); Washington v. Glucksberg, 521 U.S. 702, 720 (1997); Santosky v. Kramer, 455 U.S. 745, 753 (1982); Parham v. J.R., 442 U.S. 584, 602 (1979); Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972). ly Hanson v. Belveal, 280 P.3d 1186 (Wyo. 2012); Zupan v. Zupan, 230 P.3d 329 (Wyo. 2010); Inman v. Williams, 205 P.3d 185 (Wyo. 2009); Testerman v. Testerman, 193 P.3d 1141 (Wyo. 2008); Morris v. Morris, 170 P.3d 86 (Wyo. 2007); TW v. BM, 134 P.3d 1262 (Wyo. 2006); Harshberger v. Harshberger, 117 P.3d 1244 (Wyo. 2005); Resor v. Resor, 987 P.2d 146 (Wyo. 1999); Watt v. Watt, 971 P.2d 608 (Wyo. 1999); Gurney v. Gurney, 899 P.2d 52 (Wyo. 1995); Love v. Love, 851 P.2d 1283 (Wyo. 1993). Reavis, 955 P.2d at 431; see also Wyo. Stat. Ann. § 20-2-201 (2012) (the factors include: "(...9 the quality of the relationship each child has with each parent; the ability of each parent to provide adequate care for each child throughout each period of responsibility; the relative competency and fitness of each parent; each parent's willingness to accept all responsibilities of parenting; how the

1999 gave notice of the change of residence thus adopting a position relating to the change of residence of the minor and when the parent did not hold the primary custody[9].

Up to now, both in common law systems and in the European regulatory context, we have a preventive and shared agreement

parent and each child can best maintain and strengthen a relationship with each other; how the parents and each child interact and communicate with each other and how such interaction and communication may be improved; the ability and willingness of each parent to allow the other to provide care without intrusion, respect the other parent's rights and responsibilities; geographic distance between the parents' residences; the current physical and mental ability of each parent to care for each child; and any other factors the court deems necessary and relevant (…)". Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004) (quoting In re Burrus, 136 U.S. 586, 593–94 (1890)) ('"[T]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States (...)"). Bodne v. Bodne, 588 S.E.2d 728 (Ga. 2003) (illustrating Georgia's two-step analysis in relocation cases. The person moving for modification must prove substantial change in circumstances, then the court performs a best interests analysis); Chipman & Rush, supra note 34 (categorizing states' different approaches: "(...) to custodial parent relocation as being in one of five categories: (1) an absolute right to travel; (2) pure balancing test; (3) best interests of the child as a controlling state interest; (4) non-custodial parent's right to visitation is controlling; and (5) custodial parent's right to travel not implicated (...)"). Martin v. Martin, 798 P.2d 321, 323 (Wyo. 1990) (striking a provision from the divorce decree that restricted the custodial parent's residence to the confines of Laramie, Wyoming and holding the restriction as being a "substitute for complete analysis of all existing circumstances"). Hanson v. Belveal, 280 P.3d 1186 (Wyo. 2012); Zupan v. Zupan, 230 P.3d 329 (Wyo. 2010); Inman v. Williams, 205 P.3d 185, (Wyo. 2009); Testerman v. Testerman, 193 P.3d 1141 (Wyo. 2008); Morris v. Morris, 170 P.3d 86 (Wyo. 2007); TW v. BM, 134 P.3d 1262 (Wyo. 2006).Hanson, 280 P.3d 1186 (involving a father who petitioned to modify the custody order due to the custodial parent relocation restriction in the divorce decree); Morris, 170 P.3d 86 (involving a father who petitioned to modify the custody order due to the mother's frequent relocation with the children); TW, 134 P.3d 1262 (involving a father who petitioned to modify the custody order due to the mother's frequent relocation with the child). These states are: Alabama, see Ala. Code § 30-3-169.3 (2012); Alaska: Barrett v. Alguire, 35 P.3d 1 (Alaska 2001); Arizona: Ariz. Rev. Stat. Ann. § 25-408 (West 2012); California, see In re Marriage of LaMusga, 88 P.3d 81 (Cal. 2004); Colorado, see Colo. Rev. Stat. Ann. § 14-10-129 (West 2012); In re Marriage of Ciesluk, 113 P.3d 135 (Colo. 2005); Connecticut, see Ireland v. Ireland, 717 A.2d 676 (Conn. 1998); Delaware, see Morrisey v. Morrisey, 45 A.3d 102 (Del. 2012); Florida, see Fla. Stat. Ann. § 61.13001 (West 2012); Georgia, see Bodne v. Bodne, 588 S.E.2d 728

on responsibility for decisions that have to do with the protection and care of the minor. A fundamental contribution comes from the common law system on the matter (Braver, Ellman, Fabricius, 2003; Birnbaum, Bala, Cyr, 2011; Austin, Bow, Knoll, Ellens, 2016; Birnbaum, 2017). It is an ever-

(Ga. 2003); Hawaii, see Fisher v. Fisher, 137 P.3d 355 (Haw. 2006); Idaho, see Bartosz v. Jones, 197 P.3d 310 (Idaho 2008); Illinois, see In re Marriage of Dorfman, 956 N.E.2d 1040 (Ill. App. Ct. 2011); Indiana, see Baxendale v. Raich, 878 N.E.2d 1252 (Ind. 2008); Kansas, see Kan. Stat. Ann. § 23-3222 (West 2012); Kentucky, see Pennington v. Marcum, 266 S.W.3d 759 (Ky. 2008); Lousiana, see La. Rev. Stat. Ann. § 9:355.12 (2012); Maine, see Me. Rev. Stat. tit, 19, § 1657 (2011); Maryland, see Braun v. Headley, 750 A.2d 624 (Md. Ct. Spec. App. 2000); Massachusetts, see Mass. Gen. Laws Ann. ch. 208, § 30 (West 2012); Michigan, see Mich. Comp. Laws Ann. § 722.31 (West 2012); Minnesota, see Minn. Stat. Ann. § 518.175 (West 2012); Mississippi, see Pearson v. Pearson, 11 So. 3d 178 (Miss. Ct. App. 2009); Missouri, see Mo. Ann. Stat. § 452.377 (West 2012); Montana, see In re Marriage of Robison, 53 P.3d 1279 (Mont. 2002); Nebraska, see Brown v. Brown, 621 N.W.2d 70 (Neb. 2000); New Hampshire, see N.H. Rev. Stat. Ann. § 461-A:12) (2012); New Jersey, see N.J. Stat. Ann. § 9:2-2 (West 2012); New Mexico, see Jaramillo v. Jaramillo, 823 P.2d 299 (N.M. 1991); New York, see Tropea v. Tropea, 655 N.E.2d 145 (N.Y. 1996); North Dakota, see Dunn v. Dunn, 775 N.W.2d 486 (N.D. 2009); Oklahoma, see Okla. Stat. Ann. tit. 43, § 112.3 (West 2012); Oregon, see In re Marriage of Fedorov, 206 P.3d 1124 (Or. Ct. App. 2009); Pennsylvania, see 23 Pa. Cons. Stat. Ann. § 5337 (West 2012); Rhode Island, see Westlake v. Westlake, 874 A.2d 200 (R.I. 2005); South Carolina, see Latimer v. Farmer, 602 S.E.2d 32 (S.C. 2004); Texas, see Echols v. Olivarez, 85 S.W.3d 475 (Tex. Ct. App. 2002); Utah, see Utah Code Ann. § 30-3-37 (West 2012); Vermont, see Hoover v. Hoover, 764 A.2d 1192 (Vt. 2000); Virginia, see Sullivan v. Knick, 568 S.E.2d 430 (Va. Ct. App. 2002); and West Virginia, see W. Va. Code Ann. § 48-9-403 (West 2012). Hanson v. Belveal, 280 P.3d 1186 (Wyo. 2012) (discussing Watt and Love, but holding on the decree restricting relocation, not on the actual relocation of the custodial parent); Zupan, 230 P.3d 329 (discussing Watt and Love when the facts involved joint physical custody and intrastate restriction); Testerman, 193 P.3d 1141 (discussing Watt and Love when the facts involved an initial child custody order and intrastate restriction); Morris, 170 P.3d 86 (analyzing Watt and Love, yet the relocation issue turned on the non-custodial parent's repeated relocation); TW, 134 P.3d 1262 (addressing Watt and Love, yet not finding anything in regard to the custodial parent's relocations and holding on other grounds); Harshberger v. Harshberger, 117 P.3d 1244 (Wyo. 2005) (viewing Watt and Love as restricting interstate relocation when facts were only intrastate relocations); Resor v. Resor, 987 P.2d 146 (Wyo. 1999) (discussing Watt and Love, custody modification cases, extensively even though Resor dealt with an initial custody order); Watt, 971 P.2d 608 (making a strong statement of the relocating custodial parent's

increasing system for national and transnational child relocation cases that require the development of an adequate and recognized standard as a guarantee of the best interests of the child, for uniformity between state laws (Elrod, 2010).

Hague Conference and private international law

When we talk about relocation cases we mean the international movements of minors who meet the relevant provisions of international conventions.

The Conference of the Hague of 1980 that lead to the Convention on civil aspects of international child abduction is an important point which aims at the expeditious return of children who are wrongfully removed to a Contracting State[10].

right to travel, yet explicitly limiting such right to intrastate relocation). Colo. Rev. Stat. Ann. § 14-10-129 (West 2012); Fla. Stat. Ann. § 61.13001 (West 2012). See generally In re Marriage of Ciesluk, 113 P.3d 135 (Colo. 2005); Bodne v. Bodne, 588 S.E.2d 728 (Ga. 2003); Tropea v. Tropea, 665 N.E.2d 145 (N.Y. 1996).

8http://maryland-familylaw.com/images/AAML_Model_Relocation_Act_1998.pdf. Glennon, noting: "(...) that relocation was favored in the 1990s and 2000s, but that the trend now is moving away from a presumptive right to relocate towards requiring the custodial parent to prove a move is in the child's best interests (…) exemplifying the failure of states to develop a unanimous approach by signaling to certain states' liberal policies which allow a parent to remove a child, and to other states' efforts to prevent mobility by implementing financial penalties, for example (…)".

9See, In re Marriage of Green, 812 P.2d 11, 11 (Or. Ct. App. 1990) (stating that absent a provision prohibiting removal from the state without prior approval of the court, the custodial party may move the child without being held in contempt). The court also stated that "a move out of state by a custodial parent, in and of itself, is not a change of circumstances sufficient to warrant changing custody, unless the move is shown to have had an adverse impact on the child (...)".

10Convention of 25 October 1980 on the Civil Aspects of International Child Abduction of 25 October 1980.

This Convention deals with lawful transfers of minors and this happens if the parents do not come to an agreement for the minor. The Convention since 2001 has tried to identify and find more satisfactory methods for relocation cases based on the recognition of the intrinsic relationship between the lawful transfer and the abduction of minors[11]. The transfer and retention of a minor as an offense lies in the existence of a right of custody and access of the juridical content to a situation which is modified by the actions it has to prevent. As regards the assignment and the visit and the identification of the habitual residence, these are the central elements that are included in art. 5 of the Convention and are specified as a right of custody or custody which includes rights relating to the care of the child, as well as the right to decide on the place of residence. On the other hand, the right of access includes the right to take the minor to a state other than the habitual residence for a limited period of time. The guarantees offered by the Convention include that the custody or access right which is violated is based on the laws or judicial or administrative decisions of the state of habitual residence of the child before the transfer, and that the right is actually exercised by the parent who has

11Good Practice Hague Convention on Private International Law, par. 7.3: "(…) Courts take significantly different approaches to relocation cases, which are occurring with a frequency not contemplated in 1980 when the Convention was drafted. It is recognised that a highly restrictive approach to relocation applications may have an adverse effect on the operation of the 1980 Convention (...)", 2003, p. 106.

suffered the abduction before it is implemented, or the relative consent has been given, even of a subsequent nature, i.e. to the expatriation of the minor[12].

A transfer of the minor according to the Convention of the Hague of 1980 has as its objective the effective exercise of the right of custody and visitation as major care of the child. Shared custody implies the choice of residence of the minor that was agreed between the parents and is considered lawful as a unilateral transfer of the minor abroad and the parent demonstrates that he does not exercise the right, duty of custody[13].

12Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. op. cit. According to article 3: "The removal or the retention of a child is to be considered wrongful where: a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the state in which the child was habitually resident immediately before the removal or retention; and b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that state.

13Lederle v. Spivey, 965 A.2d 621 (Conn. Ct. App. 2009). In re Marriage of Main, 838 N.E.2d 988 (Ill. App. Ct. 2005). Goodrich v. Stobbe, 908 P.2d 416, 420 (Wyo. 1995) (citing Cook v. State, 841 P.2d 1345, 1353 (Wyo. 1992)); see also In re ANO, 136 P.3d 797, 799 (Wyo. 2006) ("(…) when precedential decisions are no longer workable, or are poorly reasoned, we should not feel compelled to follow precedent."). Hanson v. Belveal, 280 P.3d 1186 (Wyo. 2012) (holding on the decree restricting relocation, but not on an actual relocation); Zupan v. Zupan, 230 P.3d 329 (Wyo. 2010) (involving joint physical custody and intrastate restriction); Testerman v. Testerman, 193 P.3d 1141 (Wyo. 2008) (involving an initial child custody order and intrastate restriction); Morris v. Morris, 170 P.3d 86 (Wyo. 2007) (involving a noncustodial parent who moved as often as the custodial parent); TW v. BM, 134 P.3d 1262 (Wyo. 2006); Resor v. Resor, 987 P.2d 146 (Wyo. 1999) (involving an initial child custody order). Hanson, 280 P.3d 1186; Zupan, 230 P.3d 329; Inman v. Williams, 205 P.3d 185 (Wyo. 2009); Testerman, 193 P.3d 1141; Morris, 170 P.3d 86; TW, 134 P.3d 1262; Harshberger v. Harshberger, 117 P.3d 1244 (Wyo. 2005); Resor, 987 P.2d 146; Watt v. Watt, 971 P.2d 608 (Wyo. 1999); Gurney v. Gurney,

The Convention of 1980 is an important codification for accession by the states concerned. The Convention applies today to a protective climate of a society that dates back some 40 years. Already the preparatory work of the Convention was aimed at scenarios where the non-custodial parent who in most cases was the father decided to transfer the minor from the state of habitual residence to one with which the minor had no transfer relationship (Sattler, 2011; Schuz, 2013; Schuz, 2021). The abducting parent was the one who had no custody and in the majority was the mother that made a request to return to the state of origin (re-relocation), i.e. to a place better known by the minor (Baker, Groff, 2016).

Measures are still lacking in today's society and above all as regards the harmonization of the relative principles and procedures on child relocation as well as the enforceability of agreements that have to do with mediation in relation to parental responsibility and the preventive function[14].

The Hague Convention of 1996

The Hague Convention of 1996 was an important step for the protection of minors, despite in practice has produced a reduced

899 P.2d 52 (Wyo. 1995).

14Juri Committee of European Parliament, 40 years of the Hague Convention on child abduction: legal and societal changes in the rights of a child, 2020, p. 4-19.

results. The problem of parental responsibility regarding the lawful transfer of minors, public protection measures and the protection of property and minors, however, still remains. Collateral help was given by the adoption of the UN Convention of 20 November 1989 on the rights of the child which revised into practice many national laws and international conventions for greater harmony and integration.

Already art. 3 of the Hague Convention of 1996 described:

"(…) the object of the measures that must be considered included in their sphere of application: for example, the measures that limit or exclude parental responsibility and those with which the residence of the minor is fixed, the right of custody and access (…)".

In reality it was nothing more than the reprise of art. 5 of the Hague Conference of 1980 (Lagarde, 1996).

The terms of custody and access right are interpreted consistently, guaranteeing a complementarity of the two Conventions (Scarano, 2016). In practice, the Convention of 1996 includes all aspects of private international law, i.e. jurisdiction, law of application, recognition and enforcement of decisions. Cooperation between the central authorities of the contracting states is also added, referring to measures that have to do with the protection of minors. Article 5, par. 1 provided for the competence to adopt the relevant measures concerning the protection of minors in the hands of the Contracting State and the relative habitual residence of the minor. Also in this Convention of 1996 as well as in the previous one of the 1980

there was no reference to habitual residence (Pedreño, 2021). It is obvious that habitual residence also depends on family, emotional and educational interests. It is not difficult to identify the habitual residence of the minor since it refers to a place where the minor attends school and receives the relative daily care from the family and from the people in which the minor is entrusted. The habitual residence of a person can change quickly even more than once in a short period of time.

In re-relocation disputes there is the doubt that the habitual residence of the minor detects problematic factors with respect to the degree of integration required by the new environment as well as for the temporary nature of the relocation since it is seen as an obstacle to the integration of the minor (Engelcke, 2022)[15]. A relative verification was carried out through the national courts, each time taking into consideration the specificity of the case, as well as the nature of the facts constituting the residence (Burkhard, 2021). Already art. 5, par. 2 states that:

"(...) the jurisdiction is linked to the habitual residence of the minor, in the event of lawful transfer of the habitual residence to another Contracting State, from the moment of acquisition of the new residence, the authorities of the state of new residence (…)".

Thus it is understood that the habitual residence deprives the authorities of the previous habitual residence of the competence to adopt the relevant measures for the protection of the minor. The transfer of the habitual residence of the minor from one

15P.A. v. P.A. (Jerusalem Family Court, 16 December 2019). Re G (a girl) and others JK (mother) v LM (father) [2020] EWHC 1566 (Fam).

state to another takes place at the moment in which the authorities relating to the first residence decide on the application of a measure of protection where the question arises whether these authorities retain the competence to apply the relative measure (perpetuatio fori) and if the transfer of habitual residence deprives ipso facto this competence, obliging them to stay away from the relative exercise (Legarde, 1996).

Already in the preparatory work of the Hague Convention of 1996 it was decided not to accept the proposal of the American delegation regarding the possibility of maintaining the competence of the state of first residence even after the transfer of the minor to another state concerning the measures for the visit or custody for a period of 2 years, leaving the parent left behind the possibility of having relations with the minor. There are based on the idea that the authorities of the new residence was in favor of the parent where the minor had moved and are considered as empowered to question the relevant measures taken by the authorities of the previous residence of the minor. A difficulty can be seen regarding the division of competences between the authorities of the state of first residence which have decided in relation to custody and visitation rights and the new state of residence which would have had competence for the other aspects relating to parental responsibility. The problem was concentrated in the relative cooperation between Central

Authorities as foreseen by Chapter V of the Hague Convention of 1996[16]. The main objective is the greater cooperation between states and above all between the central authorities of the Contracting States, for information or consultation before the adoption of the measures envisaged, as we note through the articles 29-32 of the Conference, except in the case of cross-border placement of the minor provided for by art. 33. These are ambiguous arguments that have found a "resolution" basis through Regulation 2019/1111 within the European judicial area.

The Washington Declaration on International Family Relocation

Closing the previous paragraph with an important step in the European context in the other part of the continent, better in the system of the common law, let's see, with regard to child relocation, the organization of a conference by the Hague Convention and the Center Conference for Missing and Exploited Children, i.e. the International Judicial Conference on

16Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. According to art. 30: "(1) Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their states to achieve the purposes of the Convention. (2) They shall, in connection with the application of the Convention, take appropriate steps to provide information as to the laws of, and services available in, their states relating to the protection of children".

Cross-Border Family Relocation, which led to the Washington Declaration on International Family Relocation[17].

The Conference put an important point on the international relocation of the minor. It was the first specific, concrete element in relation to the subject of international child relocation. A declaration that was inspired by judges and oriented in the resolution of disputes that have to do with child relocation. Criterion four is especially interesting because it comprises a non-exhaustive list of factors important for the decision of the judges. It states:

"(...) (i) whether the proposals of the parties also present a series of practical implications referring to the accommodation and school of the minor or referring to the work of the parent with whom the minor moves; (ii) whether the proposals aim at guaranteeing the quality and continuity of contacts between the minor and the parents; (iii) what impact may the transfer or otherwise of the minor have on him, his family and his social relations (…)"[18].

The use of mediation as a type of tool that puts parents ready to discuss and reach a final agreement is pre-established by criterion 8 and promoted during, before, or after the proceedings. Criteria 10 and 11 focus on ensuring communication of an effective nature between the courts of the states affected by child relocation emphasizing the competent authorities of the destination state without reducing contact with the left behind parent unless there are substantial changes

17Washington Declaration on International Family Relocation, 23-25 March 2010: https://www.hcch.net/en/news-archive/details/?varevent=188

18Washington Declaration on International Family Relocation, op. cit.

relating to greater interests for the protection of the minor.

This Declaration despite the fact that was the result of a work resulting from jurisprudential practice, failed to be a guiding tool in the matter and was characterized as not having enough elementary legal discipline[19].

As can be understood, the connection of this declaration with the principles of private international law was not very clear. The European Court of Human Rights (ECtHR) has nominated the Declration as an act of soft law relating to the matter of child relocation, like other relevant acts of international law which clarifies its use or its interaction with them[20]. The states participating in the Declaration of Washington have not arrived at a consequent work on the matter (Marin Pedreño, 2019). It was only the Council of Europe that adopted a related ad hoc Recommendation in 2015.

Child relocation in EU

In the European context we have the Recommendation CM/Rec (2015) regarding the prevention and resolution of disputes in cases of child relocation. Principle 2 based on the best interests of the child is considered very important, as is principle 3 relating to the child having the right to be informed and

19MK v CK, EWCA Civ 793, 07 July 2011, par. 82.

20ECtHR, J.A.T. and J.B.T. v. The United Kingdom of 21 February 2012, par. 24.

consulted, as well as to express his/her point of view. All these principles are suitable for dealing with the lawful removal of a minor. Principle 4, relating to the avoidance of litigation, encouraged Member States to adopt rules that would allow liability holders to prevent litigation, given that the unilateral removal of the child was the basis of an agreement between the parties involved on geographical boundaries and after notice, on the duration of the minor's transfer, as well as compliance with the rules governing notification when the parent wishes to change residence with the minor. The Recommendation just cited made no reference to the Declaration of Washington and did not immediately repeat notions or principles that are included in it. Perhaps to avoid confusion. However, the list of factors taken into consideration can be found in each case of child relocation[21]. The main objective of the committee was to create an act in the European context that dealt with the issue through an analysis of common practices among the Member States, laying the foundations for a process of approximation of legislation.

The Council of Europe launched a questionnaire in Member States regarding the use and usefulness of the Recommendation

21Recommendation CM/REC(2015)4, Explanatory Memorandum, principle 8, par. 70: "(...) these factors are partly based on the factors listed in the "Washington Declaration on International Family Relocation" and on Principle 3:21 of the Principles of European family law on parental responsibilities of the Committee on European Family Law (CEFL) (…)".

by their jurisdictional authorities, in 2022. A detailed evaluation of the child relocation practice seems difficult. The lack of data is one of the reasons why it is not possible to assess whether the jurisprudence has taken the Recommendation into consideration or not. What is understood is that the Recommendation has not been used by the Member States. Perhaps because similar standards were already included through national laws and/or the Recommendation was not translated and communicated to the relevant stakeholders.

Translation or not, the national rules already covered this situation. The result remains, that in the event of a quarrel between parents living in the same residence to draw up the relevant agreement on a shared plan[22]. The drafters of the Recommendation were already aware of the national standards and especially those for parental responsibility. However, for the issue that interests us most, i.e. the residence of the minor, they have not implemented the rules but some specific rules of lawful transfer of minors and the prevention of their abduction and compliance with the related standards on the subject.

22See in Croatia the Shared Parental Care Plan from the Family Act (NN 103/15 and 98/19). In Belgium, Art. 374, par. 2 of civil code. From the Czech Republic the law n. 89/2012 of the civil code and the law n. 99/1963 of the civil procedure code.

Brussels II ter Regulation

In the European context, the Hague Convention has inspired in a more concrete way the Regulation n. 2201/2003 and the following Regulation 2019/1111, i.e. the Brussels II ter Regulation relating to European judicial cooperation in matrimonial matters and parental responsibility. The reference to the same regulation puts first of all the complementarity between the respective provisions. In this case we are talking about a much more difficult case since transnational legislation is connected with the European judicial area. The need to protect the fundamental rights of minors are enshrined in this case by the UN Convention on the Rights of the Child (UNCRC), by the European Convention of Human Rights (ECHR) and the Charter of the Fundamental Rights of the European Union (CFREU) (Long, 2015; Peers and others, 2021). Article 24 CFREU itself is already the basis of a link between the rights of minors that are protected by regional and universal systems in the legal system of the EU.

The EU has created a prevention tool for the resolution of disputes relating to the transfer of minors that was introduced in Regulation 2019/1111, with art.8 for the residence of the minor[23]

23"Article 8: Continuing jurisdiction in relation to access rights. 1.Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence shall, by way of exception to Article 7, retain jurisdiction, for three months following the move, to modify a decision on access rights given in that Member State before the child moved if the person granted access rights by the decision continues to

and art.25 for alternative dispute resolution[24]. It was an important step in the topic of civil judicial cooperation and a mature process of revision of the previous resolution[25]. The biggest problems obviously go back to issues that have to do with parental responsibility. The regulation has not provided an adequate response to guarantee the right of access that is granted in cases of separation or divorce of the parents and to avoid the international abduction of minors as a solution in extremis. We need faster, more suitable, positive protection that guarantees the protection of the minor as well as the rights of the children

have his or her habitual residence in the Member State of the child's former habitual residence. 2. Paragraph 1 shall not apply if the holder of access rights referred to in paragraph 1 has accepted the jurisdiction of the courts of the Member State of the child's new habitual residence by participating in proceedings before those courts without contesting their jurisdiction".

24"Article 28. Enforcement of decisions ordering the return of a child. 1.An authority competent for enforcement to which an application for the enforcement of a decision ordering the return of a child to another Member State is made shall act expeditiously in processing the application. 2.Where a decision as referred to in paragraph 1 has not been enforced within six weeks of the date when the enforcement proceedings were initiated, the party seeking enforcement or the Central Authority of the Member State of enforcement shall have the right to request a statement of the reasons for the delay from the authority competent for enforcement".

25Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. A proposal for a revised Regulation was adopted by the European Commission on June 30, 2016. Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM(2016) 411 final. Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession OJ L 201, 27.7.2012, p. 107–134. This refers to the already examined Regulations establishing: the European enforcement order, the European order for payment, the procedure for small claims and the European order for attachment.

of international families. The abolition of the exequatur for each provision that falls within the ratione materiae of the application of the regulation[26], as well as the coordination with the Convention of 1996 allows the Member States to guarantee compliance with the provisions of the past, as well as the related jurisprudence as it has developed over the recent years and above all with regard to international child abduction as we have seen in chapter III of the Regulation.

Also in this Regulation there are no ad hoc rules regarding the child relocation but only notions that have to do with the habitual residence of the minor and the related cases of lawful transfers. Regulation Brussels II ter through art. 8 provides that the lawful transfer of a minor from one Member State to another maintains the relative jurisdiction as regards the jurisdiction of the state where the minor habitually resides at the time when the authority is seized and for a period of 3 months after the transfer[27]. According to art. 2 of the same article the holder of the right accepts the jurisdiction of the courts of the Member State in which the minor habitually resides and where the minor is transferred. In connection with art. 8, the holders of parental responsibility that agree on the necessary adjustments to the rights and visiting methods demonstrate their impossibility to

26CJEU, C-572/21 CC of 14 July 2022, ECLI:EU:C:2022:562, not yet published.

27CJEU, C-512/17, HR of 28 June 2018, ECLI:EU:C:2018:513, published in the electronic reports of the cases.

address the jurisdictional authorities of the state of the previous habitual residence of the minor to resolve the dispute (Conçalves, 2021)[28].

Art. 8 applies in case there is a wish to change the previous decision on visiting rights. The visiting right is not granted by decision because the transfer of the minor is not lawful. In this case art. 8 refers only to the desire to amend the previous decision on visiting rights which is issued by the court from a state before the lawful removal of the child. The visiting right is not granted by decision and the transfer of the minor is not lawful where other rules of the regulation are applied according to the same article. In practice art. 8 refers to the visiting right and considers the right of custody. The recital 18 of the Regulation[29] highlights the person who has the right of custody in situations where the same law of an agreement in force and under the law of the Member State in which the minor has his habitual residence is one of the holders of parental responsibility who cannot decide on the place of residence of the minor without the relative consent of the same person. As regards shared custody, the agreements that settle it come from the

28European Commission, Practice guide for the application of the Brussels IIa Regulation, Publications Office, 2016, pp. 28Ss: https://data.europa.eu/doi/10.2838/28781

29"Examination as to jurisdiction. Where a court of a Member State is seised of a case over which it has no jurisdiction as to the substance of the matter under this Regulation and over which a court of another Member State has jurisdiction as to the substance of the matter under this Regulation, it shall declare of its own motion that it has no jurisdiction".

substantive law of the Member States and from decisions that, in the absence of an agreement between the parents, the competent authorities can establish. The recital 18 in legal systems maintains the use of the terms custody and visitation, and the noncustodial parent may retain responsibility for decisions concerning the child that go beyond visiting rights.

Art. 8 is applied in case there is a decision on visiting rights which is granted in the Member State of the first residence. The Regulation provides for the reaching of an agreement and the use of alternative resolution tools. This rule imposes on the competent court the duty to examine whether the parties are willing to engage in mediation to find the best interests of the child as an agreed solution provided that no delay to the proceedings is noted (Kruger, Carpaneto, Maoli, Lembrechts, Van Hof, Schiaccaluga, 2022). Thus, mediation has been included in the context of child abduction[30], but can also be extended to other cases, as a dispute resolution tool with a view to reaching an amicable and therefore presumably more lasting agreement, and with the aim of creating between holders of

30Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast). ST/8214/2019/INIT, OJ L 178, 2.7.2019, p. 1–115. In particular art. 25 affirms that: "(…) as soon as possible and at any stage of the proceedings, the court shall, directly or, where appropriate, with the assistance of the central authorities, invite the parties to evaluate whether they are willing to resort to mediation or other means of alternative dispute resolution, unless it goes against the best interests of the child, is not appropriate in the specific case or unduly delays the proceedings (…)".

parental responsibility a new constructive communication that takes into consideration the multiplicity of interests involved based on the use of alternative dispute resolution tools. This is not new in EU which, for some time now, has started its use, for example, on mediation in civil and commercial matters through Directive 2008/52/EC, applicable since 2011[31].

The child relocation still remains a secondary topic and faced with a fertile ground for the use of alternative resolution tools that rests on the agreement between the parties including many advantages. We are talking about economic advantages[32] above all because mediation allows the interested parties to create a field of dialogue and mutual acceptance. It ensures spontaneous fulfillment which includes an agreement that tends to be more stable over time. The transition to an alternative and non-confrontational mediation for the parties involved has as a consequence the reduction, not to say the decrease of the forced execution of the decision which constitutes the greatest problem of judicial decisions concerning minors and which risk remaining unused and in particular when they must be performed against minors who are abroad. The cross-border

31See, Protection of the rights of the child in civil, administrative and family law proceedings of 5 April 2022 (2021/2060(INI)); ICare Project, European Union's Justice Programme (2014-2020), International Family Mediation in the Best Interest of the Child, methodology and orientations for mediation in international child abduction, 2022, p. 25.

32EPRS European Added Value, A Europe for mobile and international families, 2017.

nature requires that mediation be supported through cooperation with the judicial authorities between the Member States.

Concluding remarks

What we have understood up to now from the historical and legal excursus we have made is that in our days child relocation is a topic that has not found a precise solution through a legislator at an international and European level. It is a complex subject that is difficult to solve. However, we have seen that there is no lack of political will which, through some rules, has taken positions by tackling the subject immediately with the help of two other subjects who are nearby, namely the father and mother of a minor. The internationalization of families, the fluidity of relationships, the new mediation tool[33] are ideas that question what really has to be decided in the event that one of the parents goes away. Jurisdiction, applicable law, recognition, enforcement and cooperation in matters of parental responsibility as well as child protection measures are topics that are not yet fully clarified by putting the good of the child first. This statement occurs due to the lack of specific rules for the child relocation and therefore due to the lack of effectiveness of

33The Hague Conference on Private International Law, Practitioners' Tool: Cross-Border Recognition and Enforcement of Agreements Reached in the Course of Family Matters Involving Children, 2022: https://www.hcch.net.

the final results.

The regulation Brussels II ter is an objective of simplification of procedures for the improvement of the effectiveness of the protection of minors especially in cases of international abduction by making child relocation requests legitimate by resorting to the mediation tool not as a definitive solution but as a preventive function which allows parents to come to an amicable agreement for a dispute that the minor is only an object who does not decide where he goes and why.

From the moment in which the minor is not the main subject of a dispute, the rules around him are only topics for discussion in a family nucleus. Perhaps the time has come, especially from the European point of view, for the legislator to work on an ad hoc project for child relocation with precise rules where mediation is secondary and the rules first of all must be taken into consideration even before a family makes a child and who better respects his own life and not the life of his parents.

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